No. 02-368

IN THE

Supreme Court of the United States

CHANARDAI SOOKDEO-RUIZ,

Petitioner,

v.

GCI GROUP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

HOWARD J. RUBIN
Counsel of Record
ROBERT H. COHEN
DAVIS & GILBERT LLP
Attorneys for Respondent
1740 Broadway
New York, NY 10019
(212) 468-4800

176566

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Did the Court of Appeals for the Second Circuit, consistent with the Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, and consistent with the other circuits, correctly affirm the summary judgment that the district court had granted to an employer in a pregnancy discrimination case based on its conclusion that the plaintiff did not create an issue of fact that the defendant intentionally discriminated against her on the basis of her pregnancy?

RULE 29.6 STATEMENT

Respondent, GCI Group, is wholly owned by Grey Global Group Inc., a publicly traded company.

TABLE OF CONTENTS

	Page
Question Presented	i
Rule 29.6 Statement	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement of the Case	1
Reasons for Denying the Petition	3
I. The Circuits Agree On The Method Used To Determine Whether To Grant Summary Judgment In Employment Discrimination Cases.	4
II. Even If The Second Circuit Analyzed This Case As A Retaliation Case, The Outcome Would Be Unchanged.	6
III. The Petition Should Be Denied Because It Seeks A Factual Review.	8
IV. Even If The Court Were To Review The Record To Determine If Respondent's Motion For Summary Judgment Was Correctly Granted, The Petition Should Be Denied Because The Second Circuit's Decision Was Correct.	9
Conclusion	11

TABLE OF CITED AUTHORITIES

Page

Cases:

Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456 (2d Cir.), *cert. denied*, 122 S. Ct. 460 (2001) ... 6

Coulson v. The Goodyear Tire & Rubber Co., No. 00-3818, 2002 U.S. App. LEXIS 4623 (6th Cir. March 14, 2002) 7

Geddis v. Univ. of Del., No. 01-2298, 2002 U.S. App. LEXIS 6728 (3d Cir. Mar. 8, 2002) 6

Gee v. Principi, 289 F.3d 342 (5th Cir. 2002) 7

Holtz v. Rockefeller & Co., 258 F.3d 62 (2d Cir. 2001) 7

Kilpatrick v. Paige, 193 F. Supp. 2d 145 (D.D.C. 2002) 6

Leake v. Ryan's Family Steakhouse, No. 99-2670, 2001 U.S. App. LEXIS 3524 (4th Cir. Mar. 8, 2001) 6

Mathes v. Furniture Brands Int'l, 266 F.3d 884 (8th Cir. 2001) 6

Millbrook v. IBP, Inc., 280 F.3d 1169 (7th Cir. 2002) . 6

Nawrot v. CPC Int'l, 277 F.3d 896 (7th Cir. Jan. 11, 2002) 7

Cited Authorities

Page

Palesch v. Missouri Comm'n on Human Rights, 233 F.3d 560 (8th Cir. 2000) 7

Peters v. The Lincoln Elec. Co., 285 F.3d 456 (6th Cir. 2002) 6

Price v. Fed. Express Corp., 283 F.3d 715 (5th Cir. 2002) 6

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) ..... *passim*

Richards v. Seattle, No. 00-35840, 2002 U.S. App. LEXIS 5655 (9th Cir. April 1, 2002) 7

Spillers v. Brooke County Bd. Of Educ., No. 01-1994, 2002 U.S. App. LEXIS 598 (4th Cir. Jan. 14, 2002) 7

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) 5

Weidenfeld v. Corr. Med. Svcs., No. 01-15853, 2002 U.S. App. LEXIS 7514 (9th Cir. April 12, 2002) 5-6

Zapata-Matos v. Reckitt & Colman, Inc., 277 F.3d 40 (1st Cir. 2002) 6

STATEMENT OF THE CASE

Respondent hired petitioner in or about May 1997 as a Billing Coordinator. Petitioner received a performance review on or about December 6, 1997, at which time respondent informed her of certain performance deficiencies.

In or about the fall of 1998, petitioner's supervisor, Maureen Galvin ("Galvin") began receiving complaints from other employees regarding petitioner. In early October 1998, Galvin solicited feedback from account team members with whom petitioner worked in preparation for petitioner's annual performance review. Galvin received comments from several people, most of which was negative. For example, she received feedback from a vice president, who told Galvin that petitioner was "either slow or she doesn't bill accurately." There is no dispute in the record that these complaints were made — and that they were made *before* petitioner became pregnant.

Galvin gave petitioner a performance review on October 15, 1998 and apprised her of the complaints from the account teams. While there were some positive comments in the review, petitioner admits that her review "wasn't the greatest." Thus, petitioner's argument that she never received any indication that her performance was not satisfactory prior to announcing her pregnancy is without merit.

Subsequent to the October 1998 performance review, petitioner's performance did not improve and the complaints Galvin received about her increased in frequency.

Based on petitioner's unsatisfactory performance, respondent began having internal conversations in February

1999 about placing plaintiff on probation and eventually terminating her if her poor performance continued. Moreover, also in February 1999, respondent contacted a job search firm regarding a replacement for petitioner. All of this happened *before* respondent knew petitioner was pregnant.

On March 11, 1999, petitioner told Galvin that she was pregnant. On that same date, Galvin told petitioner that she too was pregnant.

As a result of Galvin's various conversations regarding petitioner, and petitioner's continued poor performance, respondent placed petitioner on probation on March 30, 1999. Probation was to last until April 13, 1999. After being placed on probation, petitioner showed no improvement whatsoever in her performance or her attitude and, because it was clear to respondent that petitioner could never perform the job up to respondent's expectations, respondent terminated petitioner on or about April 13, 1999.

In deciding respondent's motion for summary judgment, the trial court examined the record and determined that petitioner:

> failed to offer a shred of evidence that [respondent] has a discriminatory motive. In fact, [petitioner] cannot point to a scrap of paper, a message, a conversation, or even an inappropriate remark to show that her termination was a result of her pregnancy or that the [respondent] discriminated against her because she was pregnant.

(Petitioner's Appendix ("Pet. App."), pp. 9a-10a.)

In addition, the trial court noted that respondent offered "both evidence of plaintiff's inadequate performance and of the fact that 12 other women went on maternity leave between April, 1998 and June, 2000 without negative repercussions." (*Id.*, p. 10a.) Under these circumstances, the trial court held that "there is simply no evidence of intentional discrimination," and that "a reasonable fact-finder could not conclude otherwise." (*Id.*)

The Second Circuit, in a summary order, affirmed the trial court's decision because the evidence submitted by the petitioner was " insufficient to support a jury finding in her favor, particularly in light of the evidence proffered by the [respondent] as to the causes and course of her dismissal." (*Id.*, p. 2a.)

REASONS FOR DENYING THE PETITION

Sookdeo-Ruiz's petition should be denied for several reasons. First, petitioner does not allege that there is a conflict among the circuits for this Court to address. To the contrary, the circuit courts have uniformly followed *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), and agree on the method used to determine when to grant summary judgment to employers in employment discrimination cases. Specifically, the circuits agree with the Second Circuit's holding that for summary judgment to be denied, the plaintiff must create an issue of fact that the employer intentionally discriminated against her. Petitioner has not identified any circuit or district court case that holds otherwise.

Second, even if, as petitioner argues, the Second Circuit should have analyzed her case as a retaliation case, the

circuits (including the Second Circuit) uniformly agree that Petitioner's ultimate burden — to create an issue of fact as to intentional discrimination — remains the same. Once again, petitioner has not cited any cases demonstrating a conflict and, in fact, she concedes that the analysis used by the Second Circuit is consistent with the analysis used by all other courts. Intervention by this Court now, therefore, is premature and unwarranted.

Third, Sookdeo-Ruiz essentially wants a third bite at the apple by having the Court look at the record below and decide that summary judgment was not warranted. Her petition should therefore be denied because this case turns upon its own facts, and it will not affect anyone else other than the litigants. Finally, even if the Court were to review the record below, petitioner's arguments that the Second Circuit incorrectly affirmed the grant of summary judgment are without merit.

I. THE CIRCUITS AGREE ON THE METHOD USED TO DETERMINE WHETHER TO GRANT SUMMARY JUDGMENT IN EMPLOYMENT DISCRIMINATION CASES.

In light of the uniformity among the circuits on the issue of how to determine whether summary judgment should be granted in employment discrimination cases, there is no circuit split for this Court to resolve.

In *Reeves*, the Court reiterated the standard for the burden and production of proof in employment discrimination cases. First, the plaintiff must establish a *prima facie* case. Then, the burden shifts to the employer to produce evidence of a legitimate, non-discriminatory reason for the action that it

took. Finally, "the plaintiff — once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision — must be afforded the 'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" *Reeves*, 530 U.S. 133, 143 (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-08 (1993)).

In particular, the Court stated that the "[t]he ultimate question is whether the employer intentionally discriminated, and proof that 'the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason . . . is correct.'" *Id.* at 146-47 (quoting *St. Mary's Honor Center*, 509 U.S. at 524). The Court further stated that, while sometimes evidence of pretext is sufficient to sustain a jury's finding of liability, "[c]ertainly there will be instances where, although the plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Id.* at 148.

Thus, following the Court's decision in *Reeves*, the ultimate question for courts in deciding whether to grant an employer's motion for summary judgment in employment discrimination cases is "whether [the plaintiff has created an issue of fact that] the employer intentionally discriminated [against the plaintiff]." *Id.* at 146. This is the standard that has been used by each of the circuit courts since *Reeves*, and the standard that was used by the district court in granting, and the Second Circuit in affirming, respondent's motion for summary judgment. *See, e.g.*, *Weidenfeld v. Corr. Med. Svcs.*, No. 01-15853, 2002 U.S. App. LEXIS 7514, at *3 (9th Cir.

April 12, 2002); *Geddis v. Univ. of Del.*, No. 01-2298, 2002 U.S. App. LEXIS 6728, at *5 (3d Cir. Mar. 8, 2002); *Zapata-Matos v. Reckitt & Colman, Inc.*, 277 F.3d 40, 45 (1st Cir. 2002); *Price v. Fed. Express Corp.*, 283 F.3d 715, 720 (5th Cir. 2002); *Peters v. The Lincoln Elec. Co.*, 285 F.3d 456, 470-73 (6th Cir. 2002); *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1173 (7th Cir. 2002); *Leake v. Ryan's Family Steakhouse*, No. 99-2670, 2001 U.S. App. LEXIS 3524, at *8 (4th Cir. Mar. 8, 2001); *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 466 (2d Cir.), *cert. denied*, 122 S. Ct. 460 (2001); *Mathes v. Furniture Brands Int'l*, 266 F.3d 884, 888-89 (8th Cir. 2001); *Kilpatrick v. Paige*, 193 F. Supp. 2d 145, 156 (D.D.C. 2002).

Under these circumstances, the Court should deny the petition because there is absolute uniformity among the circuit courts in deciding employer's motions for summary judgment in employment discrimination cases.

II. EVEN IF THE SECOND CIRCUIT ANALYZED THIS CASE AS A RETALIATION CASE, THE OUTCOME WOULD BE UNCHANGED.

Petitioner acknowledges that "the courts typically analyze pregnancy discrimination claims based on circumstantial evidence using the four part prima facie case established by the Court in *McDonnell-Douglas* and its concomitant burden shifting scheme." (Petition for a Writ of Certiorari, p. i.) Nevertheless, she asks the Court to grant her petition so that it can set a new standard for analyzing pregnancy discrimination cases. She argues that such cases should be decided under the framework used for retaliation cases. However, the petition should nonetheless be denied because the difference between the analysis of a retaliation

case and the analysis used for other forms of discrimination is solely in the *prima facie* case. Once the court determines whether or not the plaintiff has created a *prima facie* case, the remaining analysis under *Reeves* remains unchanged. In other words, the employer still must proffer a legitimate, nondiscriminatory (*i.e.*, non-retaliatory) reason for its action, and the plaintiff still must create an issue of fact that the employer's reason is a pretext for unlawful retaliation. *See, e.g., Richards v. Seattle*, No. 00-35840, 2002 U.S. App. LEXIS 5655, at *9 (9th Cir. April 1, 2002); *Coulson v. The Goodyear Tire & Rubber Co.*, No. 00-3818, 2002 U.S. App. LEXIS 4623, at *8-12 (6th Cir. March 14, 2002); *Spillers v. Brooke County Bd. Of Educ.*, No. 01-1994, 2002 U.S. App. LEXIS 598, at *2-3 (4th Cir. Jan. 14, 2002); *Nawrot v. CPC Int'l*, 277 F.3d 896, 905-906 (7th Cir. Jan. 11, 2002); *Gee v. Principi*, 289 F.3d 342, 347 (5th Cir. 2002); *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 79-81 (2d Cir. 2001); *Palesch v. Missouri Comm'n on Human Rights*, 233 F.3d 560, 569 (8th Cir. 2000). Thus, even if the Court were to grant the petition and ultimately hold that this case should have been analyzed under a retaliation framework, the Second Circuit's holding — that petitioner did not create an issue of fact that respondent intentionally discriminated against her — would not be overturned.

Moreover, in support of its motion for summary judgment before the trial court, respondent explicitly elected not to contest whether petitioner had made out a *prima facie* case. The trial court expressed doubt about whether plaintiff even made out a *prima facie* case, but in light of respondent's not contesting that issue, treated the case as if a *prima facie* case had been made. The Second Circuit did not address petitioner's *prima facie* case in its decision, but instead went directly to the final step in the *Reeves* analysis by addressing

whether petitioner could point to evidence that reasonably supported a finding of prohibited discrimination. Because the analysis and the factual basis on which both courts granted and affirmed the summary judgment would be the same even if the case were to be analyzed under the new paradigm that petitioner is asking the Court to apply, the outcome of the case would not change.

Accordingly, for the above reasons, Sookdeo-Ruiz's petition should be denied.

III. THE PETITION SHOULD BE DENIED BECAUSE IT SEEKS A FACTUAL REVIEW.

The trial court, in accordance with the Court's decision in *Reeves*, scrutinized the record and determined that petitioner had not created an issue of fact that respondent intentionally discriminated against her. The Second Circuit, in a *de novo* review, also scrutinized the record and affirmed the trial court's decision. Now, by seeking a review of that decision, petitioner is asking this Court for a third bite at the apple because she wants the Court to find that the Second Circuit was incorrect — that she has created an issue of fact that respondent intentionally discriminated against her.

But the Court should not grant the petition under these circumstances because the Second Circuit followed *Reeves* and reviewed the record in accordance with applicable precedent. Thus, this is a classic example of a case that turns on its own facts and does not affect other litigants — a case that the Court should not waste its time reviewing.

IV. EVEN IF THE COURT WERE TO REVIEW THE RECORD TO DETERMINE IF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT WAS CORRECTLY GRANTED, THE PETITION SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT'S DECISION WAS CORRECT.

Petitioner argued below that respondent's motion for summary judgment should be denied — notwithstanding the fact that she offered absolutely no evidence of pregnancy discrimination — because she allegedly created an issue of fact that her supervisor, Galvin, fabricated her performance problems in order to create grounds for terminating her. As "support" for her contention, petitioner denied that her performance was unsatisfactory, blamed others for problems that occurred, and stated that Galvin never told her about the various complaints regarding her performance. These conclusory allegations and unsupported statements, however, are insufficient to create an issue of fact that respondent's stated reason for terminating petitioner was pretextual.

In any event, even if petitioner created an issue of fact that respondent's legitimate, non-discriminatory reason for terminating her employment was pretextual, summary judgment was correctly granted under this Court's decision in *Reeves* because petitioner cannot convince the Court that reasonable jurors could find that discrimination existed.

Specifically, petitioner cannot make such a showing because it is undisputed that:

- Galvin received numerous complaints from account teams regarding petitioner before respondent knew that petitioner was pregnant;

- Galvin gave petitioner a performance review in October 1998 (before respondent knew that petitioner was pregnant) that, in petitioner's own words, "wasn't the greatest";

- Respondent began searching for a replacement for petitioner — and engaged a search firm for these purposes — prior to petitioner announcing that she was pregnant;

- Galvin was pregnant at the time she terminated petitioner;

- No one at respondent made any comments to petitioner about her pregnancy;

- No one at respondent made any derogatory statements about pregnant women in petitioner's presence;

- No one told petitioner about anyone who made derogatory statements about pregnant women;

- Petitioner has not identified any other women at respondent who were terminated while they were pregnant;

- Petitioner has not identified any other pregnant employees at respondent who were treated unfavorably in any other way but her;

- Since at least 1996, respondent has not terminated any other employee that it knew to be pregnant;

- In the last couple of years, at least twelve of respondent's employees have taken maternity leave and each of them was returned to her former position.

Accordingly, given these undisputed facts, no reasonable person could conclude that petitioner was terminated based on her pregnancy, and respondent's motion for summary judgment was correctly granted both by the trial court and by the Second Circuit.

Under these circumstances, the petition should be denied.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

HOWARD J. RUBIN
Counsel of Record
ROBERT H. COHEN
DAVIS & GILBERT LLP
Attorneys for Respondent
1740 Broadway
New York, NY 10019
(212) 468-4800